FILE COPY

No. 43

Office Supreme Court, U.S.
FILED
APR 21 1932
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

CHARLTON B. THOMPSON,
Covington, Kentucky,
STEPHENS L. BLAKELY,
Covington, Kentucky,
Attorneys for Petitioner.

SUBJECT INDEX

Petition For Writ Of Certiorari

PAGE

The Questions of Law Involved 3
FIRST: The Search Warrant is Illegal on Its Face 3
SECOND: The Affidavits are Insufficient 3
The Warrant 3
The Affidavits 5, 6

The Brief For The Petitioner

Opinion of the Court Below 10
Grounds on which Jurisdiction of Supreme Court is Invoked. 10-12
Statement of the Case 12-16
Specification of Assigned Errors to be Urged 16-17
Summary of Argument 18
Argument 19-35
I. The Search Warrant is Invalid on Its Face Because It Does Not State the Particular Grounds for Its Issual 19
Espionage Act, Title XI, June 15, 1917, 40 Stat. 228 et seq... 20-21
Section 3 20
Section 4 20
Section 5 20
Section 6 21
Section 12 22
Section 25, Title II, National Prohibition Act 20
Giles v. *United States*, 284 Fed. 208 (C. C. A. 1st Circuit) 23
Maccieno v. *United States*, 270 U. S. 629 25
Murby v. *United States*, 293 Fed. 849 24
Dumbra v. *United States*, 268 U. S. 435 23
II. The Affidavits Furnished No Basis for the Issual of the Search Warrant Because They State No Facts Showing Actual Sales of Liquor in the Private Residence Searched. 26
Section 25, Title II, National Prohibition Act 26
Sections 3-4-5, Title XI, Act of June 15, 1917 20

PAGE

Simmons v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th Circ.) 29
Fourth Amendment to Federal Constitution 20
Boyd v. *United States*, 116 U. S. 616 33
Byars v. *United States*, 273 U. S. 28 34
Gouled v. *United States*, 255 U. S. 298 33
Dumbra v. *United States*, 268 U. S. 435 23
Maccieno v. *United States*, 270 U. S. 629 30

CASES AND AUTHORITIES CITED

Boyd v. *United States*, 116 U. S. 616 33
Byars v. *United States*, 273 U. S. 28 ..... 11 & 34
Dumbra v. *United States*, 268 U. S. 435 23
Giles v. *United States*, 284 Fed. 208 23
Go-Bart v. *United States*, 282 U. S. 344 34
Gouled v. *United States*, 255 U. S. 298 33
Maccieno v. *United States*, 270 U. S. 629 ..... 11, 25 & 30
Murby v. *United States*, 293 Fed. 849 24
Simmons v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th Circ.) 29
United States v. *Berkeness*, 275 U. S. 149 11

Fourth Amendment to Federal Constitution 20
Section 25, Title II, National Prohibition Act 20
(1) Adopting Search Provisions of Espionage Act 20
(2) Limiting Search of Private Dwellings 26
Espionage Act, Title XI, June 15, 1917, 40 Stat. 228 20-21
Section 3 20
Section 4 20
Section 5 20
Section 6 21
Section 12 22
Judicial Code, Section 240 11

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1931

WILLIAM GRAU,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable the Supreme Court of the United States:

The petition of William Grau respectfully shows to this Honorable Court:

That this is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit rendered on March 11, 1932 (R. 29), which affirmed a judgment of the United States District Court for the Eastern District of Kentucky.

At the October, 1931, term of said District Court your petitioner was indicted under the National Prohibition Act. The indictment contained two counts. The first count charged him with the unlawful manufacture of whisky,

and the second count charged him with the possession of property designed for the unlawful manufacture of intoxicating liquor (R. 1-2). At the trial your petitioner was found guilty generally and was sentenced to be imprisoned in the penitentiary at Atlanta, Georgia, for a period of five years (R. 20).

All the evidence against your petitioner at the trial had been secured by means of a search warrant under which his private residence was searched by federal officers (R. 9).

Before the trial your petitioner filed a petition to quash the search warrant and to suppress the evidence and information secured through the search thereunder, upon the grounds that the search warrant was illegal on its face because it did not state the particular grounds for its issual, and that the affidavits on which it was based were insufficient because they stated no facts showing sales of liquor in the residence of the petitioner, as required by Section 25, Title II, National Prohibition Act. The petition was overruled and an exception was saved (R. 4).

An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit, which on March 11, 1932, affirmed the judgment of the District Court (R. 29).

A certified copy of the entire record of said case in said Circuit Court of Appeals is hereby furnished, attached and made a part of this application and marked Exhibit "A" in compliance with rule 35 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its determination in conformity with the provisions of section 240, Judicial Code.

THE QUESTIONS OF LAW INVOLVED.

Two questions of law are involved. The petitioner contends that:

First:

THE SEARCH WARRANT IS ILLEGAL ON ITS FACE BECAUSE IT DOES NOT STATE THE PARTICULAR GROUNDS FOR ITS ISSUAL.

Second:

NEITHER OF THE TWO AFFIDAVITS ON WHICH THE SEARCH WARRANT WAS ISSUED STATES ANY FACTS SHOWING SALES OF LIQUOR IN THE PRIVATE RESIDENCE SEARCHED.

I. THE SEARCH WARRANT.

The first paragraph of the Search Warrant (R. 12-14), which contains all the language relevant under the first contention, reads as follows:

> "Whereas, F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or misdemeanor against the United States; and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence,"

The recital that affidavits have been filed "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described," is a conclusion. If regarded as a quotation from the affidavits it shows the affidavits stated no facts and were insufficient. If regarded as a conclusion from the facts stated in the affidavits the warrant is defective because it does not state the "particular grounds" for its issual. In either event the warrant is unlawful.

The opinion of the Circuit Court of Appeals (R. 30) holds that the recital quoted is a sufficient compliance with section 6, Title XI, Act of June 15, 1917, 40 Stats. 228, requiring that the warrant state the particular grounds or probable cause for its issue. In this respect the decision is in conflict with

Giles v. *United States,* 284 Fed. 208, C. C. A. First Circuit, which held an almost identical recital insufficient under section 6. It is in conflict also with

Rosario Maccieno v. *United States,* 270 U. S. 629. In that case the judgment of the Circuit Court of Appeals for the Sixth Circuit, 9 Fed. (2d) 61, upholding a warrant containing the same kind of conclusions was reversed. The report in 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with directions to remand the case to the United States District Court for the Northern District of Ohio for a new trial."

However, though there was no opinion, the first point urged in the petition for a writ of certiorari in the *Maccieno* case was that the search warrant was defective in that it did not state the facts showing the grounds for its issual.

II. THE AFFIDAVITS.

The two affidavits on which the search warrants were issued are set out on page 15 of the Record. The first affidavit was made by F. M. Curtis and reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

The only definite statement of fact in this affidavit is that the affiant "smelled odors and fumes of cooking mash coming from the place." This allegation, however, does not satisfy section 25, Title II, of the National Prohibition Act, which requires proof of sales to justify a warrant for the search of a private residence. The statements about the hauling of cans commonly used in handling whisky and what appeared to be corn sugar, indicate mere conclusions; and do not even tend to show sales of whisky on the premises. The affidavit does not charge sales, nor state that the premises described were a private residence. So far as appears from the proceedings, the Commissioner may have issued the warrant in the belief that the premises were a store or a warehouse which might be searched on evidence of manufacture or possession of whisky.

This is the only affidavit considered in the opinion of the Circuit Court of Appeals, which held it sufficient (R. 30-31-32).

The second affidavit, made by H. B. Sandlin, reads as follows:

> "Be It Remembered, That on this day, before Edw. W. Pflueger, a United States Commissioner for the Eastern District of Kentucky, came H. B. Sandlin, a Federal Prohibition Agent, who being duly sworn, deposes and says there is probable cause to believe, and he does believe that the laws of the United States particularly The National Prohibition Act, are being violated by reason of the fact that intoxicating liquor, to-wit: whiskey & still is being unlawfully possessed, manufactured and sold, and possessed for sale on the premises situate in County of Campbell and State of Kentucky, and within the district above named, occupied by persons unknown, to-wit:
>
> premises known as No. 18 Lorraine Court, Woodlawn, Campbell County, Kentucky.
>
> Said charge is supported by facts set forth in the affidavit (hereto attached) of F. M. Curtis, F. P. A. Wherefore affiant applies for a Search Warrant authorizing the search of said premises for, and seizure of, evidence of said violations.
>
> H. B. Sandlin, F. P. A. (Affiant)"

This affidavit was not discussed in the opinion of the Circuit Court of Appeals (R. 29-32). The affidavit is on belief only and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28.

The ruling that the first affidavit, that of F. M. Curtis, was sufficient under Section 25, Title II, of the National Prohibition Act, is in conflict with *Simmons* v. *United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit. The substance of the affidavit on which the search warrant was issued in that case is set out in the warrant on page 88 of the report. It reads as follows:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating

liquors are kept for the purpose of sale in the eight or nine room house on Section 22 TP. 7 N. Range 12 East in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The judgment against Simmons was reversed by the Circuit Court of Appeals, on the ground that the search warrant was illegal. The opinion on page 88 says concerning the warrant:

"It does state that the affidavit shows the place is one where people congregate for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief, and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

In *Maccieno* v. *United States,* 270 U. S. 629, above cited, the affidavit stated no facts except that the affiant had investigated the premises described. It stated also the conclusion that the premises were used for the unlawful possession and sale of liquor. This affidavit was attacked in the petition for certiorari on the ground that it stated no facts. The brief of the Solicitor General, confessing error, states that the affidavit contained conclusions only and did not comply with the Statute. In commenting on the testimony of the prohibition agent who made the affidavit, the brief points out that he did not at any time "see any actual sale of liquor made upon the premises." (Brief of Solicitor General, p. 6.) This seems to indicate the opinion

that proof of actual sales must be made to justify a warrant to search a private residence. So the affidavit in the *Maccieno* case was defective not only because it stated *no* facts but because, like the affidavit in the case at bar, it failed to show sales of liquor.

On the sufficiency of the affidavit the decision of the Court below is, therefore, probably in conflict with the *Maccieno* case.

The *Maccieno* case and the case at bar have the further point in common that while both involved the search of private dwellings, which could be legally searched only on proof of sales, in neither case was the defendant prosecuted for selling liquor.

It is respectfully submitted that the search warrant in this case is illegal on its face; that both affidavits are fatally defective and that the Circuit Court of Appeals erred in affirming the judgment of the District Court and in holding the affidavit sufficient and the search warrant legal.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled William Grau, Appellant v. United States of America, Appellee, No. 6076, to the end that the case may be reviewed and determined by this Court as provided by section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the

Judicial Code, and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

WILLIAM GRAU,
Petitioner,

By CHARLTON B. THOMPSON,
STEPHENS L. BLAKELY,
Counsel for Petitioner.

In the Supreme Court of the United States

WILLIAM GRAU,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals has not been reported. It was rendered on March 11, 1932, and is copied in the Record (R. 29).

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED.

The judgment for which review is sought was rendered by the United States Circuit Court of Appeals for the Sixth Circuit on March 11, 1932 (R. 29).

The petitioner was indicted under the National Prohibition Act. The evidence against him was all secured by means of a search warrant under which his private residence was searched by federal officers. Before the trial he filed his petition to quash the warrant and to suppress

the evidence secured by the search thereunder upon the grounds: *first*, that the search warrant was invalid on its face because it did not state the particular grounds for its issual, as required by section 6, Title XI, Act of June 15, 1917, 40 Stats. 228; and *second*, because the affidavits did not state facts showing sales of liquor in his residence, as required by Section 25, Title II, of the National Prohibition Act (R. 4 et seq). The petition to quash was overruled, and an exception saved (R. 4). The petitioner was found guilty generally (R. 3 & 17) and was sentenced to be confined in the penitentiary for five years (R. 20). The petitioner appealed from this judgment to the Circuit Court of Appeals and filed assignments of errors involving the overruling of the petition to quash the search warrant and the admission of the evidence secured by the search (R. 22). The judgment was affirmed by the Circuit Court of Appeals (R. 29) and the validity of the search warrant was upheld in the opinion (R. 29-32).

The claims of the petitioner were based on the Fourth Amendment to the Constitution of the United States, on Section 25, Title II, of the National Prohibition Act, and on Sections 3-4-5-6, Title XI, of the Act of June 15, 1917, known as the Espionage Act. The rulings of the lower Court were against his contentions as indicated. The case, therefore, involves the construction of the Fourth Amendment to the Constitution and of the federal statutes referred to.

The statutory provision under which the jurisdiction of this Court is invoked is Section 240, Judicial Code.

The cases relied upon to sustain the jurisdiction are:

Rosario Maccieno v. *United States*, 270 U. S. 629.
Byars v. *United States*, 273 U. S. 28.
United States v. *Berkeness*, 275 U. S. 149.

The case comes within some of the provisions of section 5, Rule 35, of the Supreme Court Rules in that:

(1) The decision of the Circuit Court of Appeals in holding the search warrant sufficient on its face is in conflict with *Giles* v. *United States,* 284 Fed. 208, decided by the Circuit Court of Appeals for the First Circuit; and in holding the affidavit sufficient it is in conflict with *Simmons* v. *United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit.

(2) The decision of the Court below on both questions is in conflict with *Rosario Maccieno* v. *United States,* 270 U. S. 629.

STATEMENT OF CASE.

The petitioner was indicted under the National Prohibition Act and tried at the October, 1931, term of the District Court of the United States for the Eastern District of Kentucky. The indictment contains two counts. The first count charges the petitioner with the unlawful manufacture of whisky. The second count charges him with the possession of property designed for the unlawful manufacture of intoxicating liquors (R. 1-2). The indictment contains no count charging sales of liquor. At the trial the petitioner was found guilty generally (R. 3 & 17), and was sentenced to be confined in the penitentiary at Atlanta for a period of five years (R. 20).

All the evidence for the prosecution was secured by means of a search warrant under which the private residence of the petitioner was searched by federal officers (R. 9 & 25-26). Before the trial the defendant filed his petition to quash the search warrant and to suppress the evidence and information secured through the illegal

search thereunder (R. 4). The petition was overruled and the defendant saved his exception (R. 4).

The evidence secured through the search was admitted at the trial over the objection and exception of the defendant (R. 25). At the close of the evidence for the United States the defendant moved for a peremptory instruction to find him not guilty on the ground that all the evidence had been illegally obtained. The motion was overruled, and an exception was saved (R. 17 & 26). The defendant offered no evidence (R. 17).

That the premises searched were the private residence of the petitioner, not used in part or at all for any business purpose as alleged in the petition to quash the search warrant (R. 9), is not disputed. All three witnesses for the United States testified at the trial that the premises were the defendant's private residence (R. 25-26), and the Court so instructed the jury (R. 27).

The defense was based entirely on the invalidity of the search warrant and on the admission of the evidence secured through the search. The warrant was challenged in the petition to quash (R. 4 et seq) on two grounds, *first*, that it was invalid on its face because it did not state the particular grounds for its issual, as required by section 6 of Title XI, Act of June 15, 1917, 40 Stat. 228 et seq; and, *second*, that the affidavits on which it was based (R. 15) showed no actual sales of liquor in the residence, as required by section 25, Title II, of the National Prohibition Act.

I. The search warrant (R. 12) recites that affidavits had been filed,

> "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon premises hereinafter described."

It is contended by the petitioner that this language is a mere conclusion; that the "particular grounds" required to be stated under section 6 of the Act of June 15, 1917, means the grounds of the particular case; that by the provisions of sections 3, 4 and 5 of the Act these grounds can only be *facts* stated in the affidavit, and that these facts must be recited in the warrant, so that it will show on its face whether it was based on sufficient evidence. It is further contended that section 6, read in connection with section 12, shows an intention to place a check on any irregularities by federal officers, because section 12 requires that a copy of the warrant be delivered at the time of the search to the person in charge of the premises. If the copy is delivered and if it shows the facts there can be no alterations in the warrant or in the affidavits to conform to the evidence disclosed by the search.

The sections of the Act of June 15, 1917, cited above, read as follows:

Section 3: A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

Section 4: The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

Section 5: The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

Section 6: If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a Civil officer of the United States duly authorized to enforce or assist in

enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

Section 12: When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

II. The only affidavit considered by the Circuit Court of Appeals (R. 30-31) is the affidavit of F. M. Curtis (R. 15). This affidavit reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whiskey, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place, and he says there is a still and whiskey mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

It is contended by the petitioner that this affidavit is insufficient to justify the warrant to search his residence because it contains no evidence of sales. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used

for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

The Circuit Court of Appeals held that the search warrant complied with the requirements of section 6 of the Act of June 15, 1917, that it shall state the particular grounds or probable cause for its issue (R. 30), and that the affidavit was sufficient under section 25, Title II, of the National Prohibition Act (R. 31-32). The judgment of the District Court was affirmed by the Circuit Court of Appeals (R. 29). It is for a review of this judgment of the Circuit Court of Appeals that the petition for a writ of certiorari is filed.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

The assignments of Errors to be urged are:

The First Assignment: That the Court erred in overruling the petition to quash the search warrant and to suppress the evidence obtained by the unlawful search of the defendant's residence thereunder, in violation of the Fourth and Fifth Amendments to the Constitution of the United States and of certain statutes set out in the petition to quash (R. 22).

Second Assignment: That the Court erred in admitting over the objection and exception of the defendant the testimony of F. M. Curtis, H. B. Sandlin and J. T. Tartar concerning information secured by the illegal search of the defendant's residence (R. 22).

Third Assignment: That the Court erred in overruling the motion of the defendant made at the conclusion of the

evidence of the United States, to instruct the jury peremptorily to find the defendant not guilty under each count of the indictment, for the reason stated in the *second* ground under this assignment, namely, that all the evidence introduced had been secured by an illegal search of the defendant's residence, in violation of said federal statutes and in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. 22).

SUMMARY OF ARGUMENT.

I.

THE SEARCH WARRANT IS INVALID ON ITS FACE BECAUSE IT DOES NOT STATE THE "PARTICULAR GROUNDS OR PROBABLE CAUSE" FOR ITS ISSUAL AS REQUIRED BY THE STATUTE.

Title XI, Act of June 15, 1917, sections 3, 4, 5, 6, 12, 40 Stats. 228 et seq.

Giles v. *United States*, 284 Fed. 208 (C. C. A. 1st Circuit).

Murby v. *United States*, 293 Fed. 849 (C. C. A. 1st Circuit).

Maccieno v. *United States*, 270 U. S. 629.

Dumbra v. *United States*, 268 U. S. 435.

Boyd v. *United States*, 116 U. S. 616.

Byars v. *United States*, 273 U. S. 28.

II.

THE AFFIDAVITS FURNISHED NO BASIS FOR THE ISSUAL OF THE WARRANT TO SEARCH THE PRIVATE RESIDENCE BECAUSE THEY STATE NO FACTS SHOWING ACTUAL SALES OF LIQUOR ON THE PREMISES.

Section 25, Title II, National Prohibition Act.

Espionage Act, Title XI, Act of June 15, 1917, sections 3, 4, 5.

Fourth Amendment to Federal Constitution.

Simmons v. *United States*, 18 Fed. (2d) 85 (C. C. A. 8th Circuit).

Boyd v. *United States*, 116 U. S. 616.

Byars v. *United States*, 273 U. S. 28.

Gouled v. *United States*, 255 U. S. 298.

Go-Bart v. *United States*, 282 U. S. 344.

ARGUMENT.

I. The Search Warrant.

The search warrant is invalid on its face because it does not state the particular grounds for its issual. The grounds set out are in the first paragraph, which reads as follows (R. 12):

> "Whereas, F. M. Curtis and H. B. Sandlin has made oath as complainant, and has presented his written affidavit, duly subscribed by him, before the undersigned, Edw. W. Pflueger, U. S. Commissioner for the Eastern District of Kentucky, alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described, as a means of committing a felony or a misdemeanor against the United States, and whereas said complainant, before the issuing of this warrant, has been examined on oath by the undersigned Commissioner, and that probable cause, supported by said affidavit, has been shown that said property is being used to commit a felony or misdemeanor, to-wit: unlawful manufacture, possession and sale of intoxicating liquor (whisky & still); and whereas said affidavit names the person and particularly describes the property and place to be searched and sets forth the facts tending to establish the grounds of the application or probable cause for believing that they exist; and whereas the undersigned Commissioner is now satisfied of the existence of the grounds of the application for this warrant and that there is probable cause to believe their existence,"

The recital of the grounds is contained in the language that affidavits have been presented alleging that, "intoxicating liquors and property designed for the manufacture of intoxicating liquors have been and are being possessed, used and sold upon the premises hereinafter described."

That such a general conclusion is not sufficient under the search warrant statute, Title XI, Act of June 15, 1917,

40 Stats. 228, seems clear from four sections of the act. This Act is adopted by Section 25, Title II, of the National Prohibition Act which provides in part as follows:

> "A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917."

The Fourth Amendment to the Federal Constitution, whose objects are carried out in detail by the search warrant act, reads as follows:

> "The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Title XI of the Act of June 15, 1917, is found at 40 Stats. 228 et seq. Sections 3, 4, 5, and 6 of this act taken together show clearly what is meant by the term "particular grounds" required by section 6 to be stated in the search warrant. The sections provide as follows:

Section 3: "A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and place to be searched."

Section 4: "The judge or Commissioner must, before issuing the search warrant, examine on oath the complainant and any witness he may produce and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Section 5: "The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Section 6: "If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States, duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

From the wording of sections 5 and 6 it appears that the terms "particular grounds" and "probable cause" as used in section 6 means the same thing. "Particular grounds" evidently means the grounds in the particular case. There is no other reason for the use of the word "particular." And the grounds must be the *facts stated in the affidavits,* because by sections 3, 4, and 5 these affidavits are the only basis for the issual of the warrant.

The evident purpose of Congress was to require the warrant to show on its face whether it was based on sufficient grounds. This purpose is not satisfied by a recital that the affidavits allege that "intoxicating liquor and property designed for its manufacture have been and are being possessed, used and sold on the premises." That language besides being a conclusion is at most a *general* statement which would cover every case under the National Prohibition Act.

There is another reason to be drawn from the statute for the requirement in section 6 that the particular grounds be stated in the warrant. It was evidently meant as a check on the federal officers. By requiring that both the grounds for its issual and the names of the affiants be

set forth, it prevents any additions or alterations from being made in the record to conform to the evidence disclosed by the search. If the warrant states the facts required no changes or additions can be made, because section 12 of the Act requires that the officer who seizes property under the warrant must leave a copy of the warrant with the person in whose possession it was found. The provision is as follows:

Section 12: "When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

Sections 6 and 12 if enforced furnish a complete check on irregularities. They also prevent surprise at any hearing on the warrant, because the whole case is stated on its face. But to achieve this end both section 6 and section 12 must be complied with. In the case at bar a copy of the warrant was delivered to the petitioner. Section 12 was thus followed, but section 6 was not. The warrant did not state the *facts* contained in the affidavits, and the petitioner was informed only of a set of conclusions so general that any affidavit under the National Prohibition Act would have been included in its terms.

The provisions of Title XI of the Act of June 15, 1917, above quoted, are parts of a carefully drawn code contained in the Espionage Act. This Code consists of twenty-two sections which carry out in detail the principles stated generally in the Fourth Amendment. It is the result of long experience in seeking to prevent unreasonable searches. Its provisions are mandatory.

In *Dumbra* v. *United States*, 268 U. S. 435, the opinion says at page 439:

> "Title XI of the Public Law approved June 15, 1917, known as the 'Espionage Act,' referred to in § 25 of the National Prohibition Act, lays down the procedure which must be followed upon the issue of Search Warrants."

On the mandatory character of this code and on the construction of the phrase "particular grounds" in section 6, our position is fully supported by *Giles* v. *United States*, 284 Fed. 208, decided by the Circuit Court of Appeals for the First Circuit. The case involved the search of a drug-store under a search warrant which was attacked as illegal. The District Court upheld the warrant, and admitted the evidence secured under it. The defendant was convicted. The Circuit Court of Appeals reversed the judgment on the ground that the search warrant was defective. One of the defects pointed out in the opinion was the failure of the warrant to state the particular grounds for its issual. The recital in the warrant was substantially like the recital in the warrant here involved. The warrant condemned in the *Giles* case states (p. 213 Report) that an affidavit had been made before the Commissioner,

> "by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely the National Prohibition Act, have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles on North Main Street," etc.

The opinion of the Court says at page 215:

> "Nor in the search warrant used in this case was there adequate compliance with the requirements of section 6, supra, requiring that the warrant itself should state the particular grounds or probable cause for its issue * * *"

This language evidently means that the facts must be stated in the warrant, because it did state the conclusions. In the earlier part of the opinion the Court states that the provisions of the search warrant statute must be strictly followed. At page 212 the Court says concerning these provisions:

> "This careful codification of search warrant law leaves little or nothing for implication either as to the extent of the power or the method of its exercise * * *. The provisions of sections 3-6 are declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment to the Constitution of the United States, and of similar provisions in State Constitutions."

In *Murby* v. *United States,* 293 Fed. 849, the Circuit Court of Appeals for the First Circuit held, in effect, that section 12 of the Act of June 15, 1917, above quoted, is mandatory. In that case the return on the search warrant failed to show that a copy had been delivered to the defendant. The Court in holding this to be a fatal defect says at page 853:

> "If in fact this provision (section 12) was complied with, the return should have shown it affirmatively. If it was not complied with, the search warrant proceedings were void, and the evidence obtained thereby inadmissible."

Section 12 and section 6 are of equal importance because together they enforce regularity in the proceedings.

The opinion of the Circuit Court of Appeals in the present case quotes the recital in the search warrant that the witnesses had presented affidavits "alleging that intoxicating liquors and property designed for the manufacture of intoxicating liquor have been and are being possessed,

used and sold upon the premises hereinafter described," and says (R. 30):

> "We are of the opinion that the form of the warrant was sufficient compliance with the requirements of Paragraph 6 of the Act of June 15, 1917, that it shall state 'the particular grounds or probable cause' for the issue of the warrant and the names of the persons whose affidavits have been taken in support thereof."

This language apparently does not question the mandatory character of section 6 but construes it in a way that defeats its evident purpose.

In *Maccieno* v. *United States,* 270 U. S. 629, the search warrant was attacked on the ground that it did not state the facts showing the grounds for its issual. In its statement of the grounds it is substantially like the warrant here involved, and is set out on page 2 in the petition for certiorari in that case. The first paragraph of the warrant which recites the grounds, reads as follows:

> "Whereas complaint on oath, and in writing supported by affidavit, has this day been made before me, Martin J. Monahen, a United States Commissioner for said District, by J. G. Plappert alleging that the laws of the United States, namely, the National Prohibition Act, Oct. 28, 1919, Revised Statutes, have been and are being violated by unlawfully using the premises, being the premises at 2570 East 39th Street, Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings on the premises, for the unlawful possession and sale of liquor, to-wit, whisky, spirits etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. A soft drink place is on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant and being situate in the County of Cuyahoga, and State of Ohio, and within the district above named."

After setting out the warrant, the petition for certiorari in the *Maccieno* case says at page 3:

> "A reading of the warrant will indicate that it does not contain any facts; and that all it sets forth is that the National Prohibition Law was being violated."

The brief of the Solicitor General does not discuss this particular point, though it twice cites *Giles* v. *United States*, 284 Fed. 208, on other questions; and the *Giles* case, before cited, holds that such a recital does not state the particular grounds for the issual of the warrant as required by section 6 of the Search Warrant Code.

The judgment against Maccieno was reversed. The report at 270 U. S. 629 says merely:

> "Petition for certiorari granted and the judgment of the Circuit Court of Appeals reversed on confession of error by the Government, with directions to remand the case to the United States District Court for the Northern District of Ohio for a new trial."

II. The Affidavits.

Neither of the two affidavits shows any actual sales of liquor on the premises. Section 25, Title II, of the National Prohibition Act provides in part as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

That the premises described and searched were a private dwelling occupied as such by the petitioner, and not used in part or at all for any business purpose, is alleged in the petition to quash the search warrant (R. 9), and is

nowhere disputed. It is supported by the evidence of the three witnesses for the prosecution (R. 25-26-27) and the Court instructed the jury that the premises were the private residence of the defendant (R. 27).

Only the affidavit of F. M. Curtis (R. 15) was relied on by the United States or referred to in the opinion of the Circuit Court of Appeals (R. 30-31). It is the only one that states any facts. It reads as follows:

> "Now comes F. M. Curtis, P. A. and makes oath and states that on or about October 14, 1931, he went around and about the premises hereinafter described and saw persons haul cans, commonly used in handling whisky, and what appeared to be corn sugar up to and into the place, and saw the same car or truck haul similar cans, apparently heavily loaded, away from there and smelled odors and fumes of cooking mash coming from the place, and he says that there is a still and whisky mash on the premises; said premises being known as No. 18 Lorraine Court (Woodlawn) Newport, Campbell County, Ky.
>
> F. M. Curtis, F. P. A."

We submit that there is nothing in this affidavit to show sales of whisky on the premises. The only statement of a definite fact is the statement that the affiant smelled "odors and fumes of cooking mash coming from the premises." If this shows any offense it shows manufacture. But proof of manufacture, even aided by proof that cans *commonly* used in handling whisky and *apparently* heavily loaded were hauled away, does not prove sales on the premises. In a legal sense it does not even tend to prove sales anywhere. A man found with great quantities of liquor in his possession may be suspected of being in the liquor business, but proof of such possession alone does not tend to prove sales. Nor would evidence of this possession in a

private residence justify a warrant to search the residence. To be held guilty of selling, some particular sale must be proved. It is not enough to show a situation from which an impression may be gotten that some general selling may be going on. Otherwise the offense of possessing, specifically distinguished from the offense of selling by the Statute, would be merged into the greater offense. A warrant to search a private dwelling is one of the most drastic processes of the law. Since it can lawfully be issued only for sales on the premises, the evidence should be at least sufficient to take the case to the jury if submitted at a trial on an indictment for selling. And for this purpose proof of some actual sale would be necessary.

The opinion of the Circuit Court of Appeals clearly shows that the Court did not regard proof of actual sales necessary to justify the search warrant. It says that the National Prohibition Act does not authorize a search warrant for a dwelling merely because it is being used for the manufacture of liquor, but that the Act is satisfied by an affidavit establishing probable cause for the charge that the premises are being used for the prosecution of commercial sales. The opinion then proceeds (R. 31):

> "One does not manufacture liquor for his own use in such quantities as to require wholesale deliveries of corn sugar or the other ingredients of mash; and whisky so manufactured for personal use is not ordinarily shipped from the premises in cans, by automobile or truckload; nor are the cans in such case subsequently returned for refilling. Under the criterion established by *Dumbra* v. *United States* such allegations are clearly adapted to warrant the belief that the dwelling is being used as a headquarters for the merchandising of liquor. This, we reaffirm, is sufficient compliance with the requirement of Section 25 that a dwelling may be searched if 'being used for the unlawful sale of intoxicating liquor.' "

This language seems to assume that the affidavit states that there were wholesale deliveries of corn sugar to the house and that whisky was shipped away in cans by truckload. The affidavit says only that what *appeared* to be corn sugar was hauled to the place and the cans *commonly used* in handling whisky and *apparently* heavily loaded were hauled away in the same car or truck. This at the most states the opinion of the affiant that corn sugar was hauled in and that whisky was hauled away.

The affidavit shows that the agent did not *know* that either of these things happened. And it says nothing whatever about the amount of what appeared to be corn sugar, nor about the number or size of the cans. If this sort of evidence is held sufficient to establish sales on the premises it will not seriously tax the ingenuity of prohibition agents to make a case for the search of a residence wherever there is any evidence of manufacture. There is no way to check the evasion of Section 25, Title II, except by requiring proof of actual sales on the premises.

That proof of actual sales must be made to authorize a warrant to search a private residence is held in *Simmons v. United States,* 18 Fed. (2d) 85, decided by the Circuit Court of Appeals for the Eighth Circuit. In that case the warrant for the search of a private dwelling recites, page 88:

> "Proof by affidavit having this day been made before me by H. C. Coates that he believes intoxicating liquors are kept for the purpose of sale in the eight or nine room house on Sect. 22 Tp. 7 N. range 12 East, in Okfuskee County, Oklahoma, owned by Ed. Holmer and occupied as a joint by Harris Simmons, said house being south and east of Paden on the right side of the road. That said affidavit shows that the place is a place where people congregate for the purpose of buying and selling intoxicating liquors, and is a place where people congregate seemingly sober and leave under the influence of intoxicating liquors."

The Court held the affidavit insufficient. The opinion (p. 88) says in part:

> "This warrant shows on its face that the proof upon which the said state judge based the finding of probable cause is the affidavit of Mr. Coates, and that such affidavit goes only to the extent of showing that Coates *believed* intoxicating liquors were kept for sale in a certain house. It does state that the affidavit shows the place is one where people congregated for the purpose of buying and selling intoxicating liquors and where people congregated sober and left under the influence of intoxicating liquor. This is based on affiant's belief, and there is nothing in the affidavit, as judged by the terms of the search warrant, to show actual sales or that Coates had any personal knowledge of sales."

On the same page (88) the Court says concerning the search of private dwellings:

> "The probable cause for the issuance of such warrant must be based on evidence of sales."

The affidavit of H. B. Sandlin in this case (R. 15) is made on belief only and was not considered by the Court below and is clearly insufficient under *Byars* v. *United States,* 273 U. S. 28.

The Maccieno Case.

The affidavit in *Maccieno* v. *United States,* 270 U. S. 629, is set out on pages 3-4 of the petition for a writ of certiorari in that case, and is referred to on page 5 of the brief of the Solicitor General as being on page 24 of the record. The affidavit reads as follows:

> "Be It Remembered, That on this date, before me, the undersigned, a United States Commissioner for the Northern District of Ohio, Eastern Division, came

J. G. Plappert, F. P. A., who being by me duly sworn, deposes and says that the laws of the United States, namely The National Prohibition Act, Oct. 28, 1919, Revised Statutes, are being violated by reason of the facts, to-wit: Affiant states that he has investigated the premises at 2570 E. 39th St., Cleveland, Ohio, and the rooms and places in and about the 2 story frame building, and all outbuildings located on the premises, and finds that all the same are used in part or solely for the unlawful possession and sale of liquor, to-wit, whiskey, spirits, etc., containing 1.2 of 1% or more of alcohol by volume for beverage purposes. (A soft drink place and) connecting rooms are on the first floor of the main building, basement below and other rooms above, all of which are used in part or solely for the unlawful sale of said liquor. The premises are used and occupied by person or persons, whose name or names are unknown to affiant.

. . . . being premises of . . . .

. . . . and being situated in the County of Cuyahoga and state of Ohio, and within the district above named."

The brief of the Solicitor General (p. 5) expresses the opinion that the affidavit is defective in that no facts are set forth but merely conclusions. On page 6, however, the brief comments on the testimony of the agent who made the affidavit, as follows:

> "The only investigation he had made was that he 'seen machines drive in on the premises,' and smelled the odor of mash, and 'seen men coming there and machines going away' and 'I was convinced there was something being sold there' (R. 13). He admits that he did not at any time see any actual sale of liquor made upon the premises; that the allegations in his affidavit were not based upon actual knowledge of sale, but were rather based 'upon a conclusion which I drew' (R. 14)."

This testimony was quoted for the evident purpose of showing that the conclusions in the affidavit were not even

based on sufficient facts. In other words, if the testimony of the agent had been embodied in the affidavit it would not have justified the issual of the search warrant, because it showed no actual sales of liquor in the residence. This reasoning, if sound, disposes of the affidavit in the present case, because although it contains some facts it shows no actual sales.

An anomalous situation necessarily results from treating such affidavits as sufficient to justify an inference of selling *for the purpose of search.* The same evidence was evidently not considered sufficient to prove selling at the trial, because the indictment contains no sales count (R. 1-2). And the sales count was omitted, notwithstanding the additional evidence secured through the search. The lawyer who drew the indictment evidently realized that manufacture, possession, transportation and selling are different offenses and that proof of one offense does not establish the commission of another. It was only for the purpose of circumventing the requirement that sales be proved for the purpose of the search that this evidence was used to establish selling.

In the *Maccieno* case the brief of the Solicitor General comments with disapproval on a similar situation in that case. The brief (p. 7) says:

> "Though the only ground upon which a warrant may be issued to search a private dwelling is that liquor is sold there, it is to be noticed that the information contained no count charging the defendant with the sale of liquor, except such as is incidental to the nuisance count."

The Construction of Section 25, Title II, National Prohibition Act.

The decision of the Circuit Court of Appeals in the present case certainly restricts the exemption in Section 25, Title II, of the National Prohibition Act within narrow limits. The exemption was intended to be a broad one, confining the search of homes to cases of actual selling. Under the decision of the Court below the restriction is made almost meaningless because selling may be inferred from other offenses which are themselves excluded as grounds for searching houses. This narrow construction seems to reverse the principles of broad construction repeatedly applied by this Court in cases involving the Bill of Rights. These cases have definitely established the rule that the provisions of the Bill of Rights are to be broadly construed and protected against gradual encroachments that seek to deprive them of their effectiveness. And it is in relation to the Fourth Amendment that this principle has been most frequently and most emphatically applied.

Boyd v. *United States,* 116 U. S. 616, which involved the Fourth and Fifth Amendments, laid down the rule (p. 635) that constitutional provisions for the security of person and property should be liberally construed, and protected against stealthy encroachments.

In *Gouled* v. *United States,* 255 U. S. 298, the Court says of the Fourth and Fifth Amendments at page 304:

> "It has repeatedly been decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by them, by imperceptible practice of Courts or by well intentioned but mistakenly overzealous executive officers."

In *Go-Bart* v. *United States*, 282 U. S. 344, the Court in speaking of the Fourth Amendment says at page 357:

> "The amendment is to be liberally construed, and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

And in *Byars* v. *United States*, 273 U. S. 28, the Court says at page 33:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right."

The proceedings in the case at bar seem to involve the evils referred to in the cases just cited. They leave no force to section 6 of the Act of June 15, 1917. The construction that a general conclusion in the search warrant is a statement of the particular grounds for its issual, deprives section 6 of the check intended on the issual of warrants without sufficient grounds. The ruling that sales may be inferred from the statements in the affidavits tending to show manufacture and stating a mere belief of transportation, may be classed as a stealthy encroachment on Section 25, Title II, of the National Prohibition Act. The entire proceedings narrow the rights protected by the Fourth Amendment and by the Statutes enacted pursuant to it, and open the door to gross abuse of the search warrant process.

CONCLUSION.

In conclusion, we submit that *Giles* v. *United States,* 284 Fed. 208, fully sustains our position on the invalidity of the search warrant itself; that *Simmons* v. *United States,* 18 Fed. (2d) 85, sustains our position on the insufficiency of the affidavit, and that *Rosario Maccieno* v. *United States,* 270 U. S. 629, considered with the petition for certiorari and the brief of the Solicitor General, sustains us in at least one, if not both, of our contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be sustained and that the judgment of the Circuit Court of Appeals should be reversed.

CHARLTON B. THOMPSON,
STEPHENS L. BLAKELY,
Attorneys for Petitioner.